Filed 12/28/18 In re C.A. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re C.A., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. H.B., Defendant and Appellant.	E070405 (Super.Ct.No. J271821) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Svetlana Kauper, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, H.B. (Mother), is the mother of C.A., a boy born in May 2015. C.A. was taken into protective custody in July 2017 after Mother was found passed out behind the wheel of a car in a grocery store parking lot with C.A. in the back seat. Mother's blood-alcohol content was .24, and she had a history of untreated mental illness and substance abuse. C.A. was placed with his maternal grandparents (MGP's), who had previously adopted C.A.'s older sibling, A. Mother was denied services for C.A. (Welf. & Inst. Code, § 361.5, subd. (b)(10), (11).)[1]

Mother appeals the juvenile court's April 26, 2018, order denying her section 388 petition seeking reunification services for C.A. or the return of C.A. to her care. She claims her petition was erroneously denied without a full evidentiary hearing because she made a prima facie showing of changed circumstances and that granting her services or custody of C.A. would serve C.A.'s best interests. We conclude the juvenile court did not abuse its discretion in finding Mother did not make a prima facie showing that granting either of her requests would serve C.A.'s best interests. Thus, Mother's petition was properly denied without an evidentiary hearing, and it is unnecessary to determine whether Mother made a prima showing of changed circumstances.

Mother also challenges the juvenile court's January 10, 2018, finding that the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) did not apply to C.A. on the ground that plaintiff and respondent, San Bernardino County Children and Family

[1] Undesignated statutory references are to the Welfare and Institutions Code.

Services (CFS), gave inadequate notices of the October 31, 2017, jurisdiction and disposition hearing. We find no reversible ICWA notice error. Thus, we affirm the April 26, 2018, order denying Mother's section 388 petition and the January 10, 2018, finding that adequate ICWA notices were given and ICWA did not apply.

II. FACTUAL BACKGROUND

A. *The Events Leading to C.A.'s Dependency*

In July 2017, law enforcement officers found Mother passed out behind the wheel of a car in a grocery store parking lot while C.A., then age two, was in the back seat. Mother had a blood-alcohol content of .24 and an open container in the car. She was arrested for driving under the influence and willful cruelty to a child. She had numerous prior arrests or convictions for driving under the influence, disorderly conduct, and drug-related offenses. C.A. was taken into protective custody and placed with the MGP's.

Mother admitted driving to the store with C.A. and buying beer, but denied being passed out in the car or having a current alcohol or substance abuse problem—though she admitted a history of alcohol abuse. On the day of her arrest she drank four beers in an eight-hour period: two 16-ounce cans and two 24-ounce cans. She said she made "a bad choice" but was "just trying to calm" herself and was drinking only because her medication had been stolen. She had previously been diagnosed with bipolar disorder and manic depression.

Mother had four children, including C.A., her youngest child. C.A.'s full sibling, A., born in January 2010, was removed from parental custody in February 2011 due to

the parents' substance abuse. In December 2012, parental rights to A. were terminated and the MGP's adopted A. The parents had failed to make progress in their case plan for A. which included substance abuse programs. Mother claimed A. had been removed from parental custody due to "false reports" of substance abuse by herself and B.A. (Father), the father of A. and C.A. Father is not a party to this appeal.

Also in July 2017, Mother's two oldest children, then ages 15 and 17, were living with their father who had sole custody of them. Mother was married to her two older children's father from 2001 to 2007. Mother was a licensed cosmetologist but was unemployed and living with her brother, who was providing her with "emotional and financial support." Father was also unemployed and living with his parents. Father tested positive for opiates, marijuana, and ethanol in August 2017. Father admitted a history of substance abuse and that methamphetamine had been his drug of choice, but he claimed he last used the drug four or five years earlier.1CT 37} CFS reported Father was not being honest about his substance abuse. Father was convicted of drug-related charges in 2015 and, like Mother, had numerous arrests or convictions for driving under the influence and using or being under the influence of controlled substances.

Mother and Father were in a relationship for eight years, from 2009 until C.A. was taken into protective custody in July 2017. Mother admitted having "anger issues" and she and Father would argue, but both parents denied engaging in domestic violence. Mother was willing to do "whatever" it took to get C.A. back and claimed she had "worked really hard to turn her life around" after C.A. was born. CFS reported that

neither parent had taken responsibility for their actions that led to the removal of A. and that both parents lacked insight into their substance abuse problems.

C.A. was ordered detained outside parental custody. C.A. was in good health, appeared to have no developmental delays or signs of emotional abuse, and was "well bonded" with Mother and the MGP's. Pending jurisdiction and disposition, the parents were granted supervised visits with C.A. and received service referrals, but CFS recommended bypassing services to both parents. (§ 361.5, subd. (b)(10), (11).) CFS reported it was doubtful either parent would gain sobriety because there had been no apparent change in their lifestyles since the 2011-2012 dependency case involving A.

B. *Jurisdiction and Disposition (October 31, 2017)*

Mother testified at the jurisdiction/disposition hearing on October 31, 2017. Since July 2017, she had been attending counseling sessions to address her anxiety and depression, along with parenting classes, an outpatient drug and alcohol program, and Alcoholics Anonymous (AA) meetings. Mother admitted an alcohol problem but denied a substance abuse problem; she had been sober for over 100 days and she was choosing not to drink. Before September 2012, Mother completed anger management and parenting classes, a Proposition 36 program to address her alcohol abuse, and attended AA meetings. Mother's counsel represented Mother was currently employed.

Father was present at the hearing but had not participated in any services or drug tests since July 2017. CFS presented additional evidence that Mother tested positive for opiates four times between August 9, 2017, and September 11 2017. On September 19,

2017, Mother confirmed she continued to take hydrocodone for nerve damage in her lower back.

The court sustained the allegations of an amended petition and found C.A. was a child described in section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling). Among other things, the court found Mother had an untreated mental illness which impaired her ability to care for C.A. and "a substance abuse problem from which she has failed and/or refused to rehabilitate" which also impaired her ability to care for C.A.

The court denied or bypassed services for both parents (§ 361.5, subd. (b)(10), (11)) and set a section 366.26 hearing.[2] The court said Mother had made "some efforts" to address the problems that led to A.'s and C.A.'s dependencies but questioned the "sincerity" and "reasonableness" of her current efforts to remain sober, noting she was "in great denial." The court "encouraged" both parents to file section 388 petitions for services and told the parents it would be "happy" to grant them services if they would "turn things around with all sincerity. . . ."

C. *Mother's Section 388 Petition (Filed February 28, 2018; Heard April 26, 2018)*

The section 366.26 hearing was originally scheduled for February 28, 2018. On February 27, CFS filed a section 366.26 report asking the court to continue the hearing

[2] Mother filed a notice of intent to file a writ petition challenging the October 31, 2017, order setting the section 366.26 hearing. (Cal. Rules of Court, rule 8.452(a).) On December 4, 2017, this court dismissed Mother's writ petition for failure to timely file a brief in support of the petition or a timely motion for relief from default.

for 120 days so CFS could complete an adoption assessment for C.A. The report stated the MGP's had not made themselves available for a section 366.26 interview; there were "additional individuals" living in the MGP's home; and an "[un]approved" recreational vehicle was attached to the home.

CFS also reported that the MGP's had been supervising Mother's visits with C.A. and the visits had gone well. C.A. and A. were bonding and getting along well in the MGP's home. The MGP's reported they often initiated Mother's visits and had to pick up Mother so she could attend the visits. The MGP's were "open" to allowing Mother to have continued supervised visits with C.A. if parental rights were terminated as long as the visits were beneficial to C.A. Father had not visited C.A. more than twice since July 2017 when C.A. was placed in the MGP's care.

On February 28, the day of the scheduled section 366.26 hearing, Mother filed a section 388 petition seeking services and asking the court to consider returning C.A. to her custody. The court granted CFS's continuance request, and continued the section 366.26 hearing to June 28, 2018. The court asked CFS to file a response to Mother's section 388 petition so the court could determine whether or not to "set a . . . further informational hearing on prima facie for [section] 388." The court set a hearing on April 26, 2018, to determine whether it should grant or deny an evidentiary hearing on Mother's petition.[3]

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[3] At the February 28, 2018, hearing, Mother's counsel told the court that Mother had filed her section 388 petition without her counsel's assistance; counsel had not had a chance to review the petition; and Mother "may be adding or filing a supplemental" to

[footnote continued on next page]

On April 13, 2018, CFS filed an "interim review" report, responding to Mother's petition and recommending the court deny the petition. A social worker visited Mother in Mother's home on March 27; Mother reported she was sober, had completed an outpatient program, and was continuing to participate in counseling and a parenting class. Mother was not working but was looking for employment; her living situation was stable; and she was no longer in contact with Father.

CFS also claimed in its response that "[a]ll of the facts" Mother presented during her March 27 interview "were contradicted" in an April 2 interview with the MGP's. According to the maternal grandmother, Father was renting the home where Mother was living; Father's was the only name on the lease; and Father was believed to live in the home with Mother at least some of the time. Moreover, the parents were being evicted from the home; Father was "still an active part" of Mother's life; and the domestic violence between Mother and Father was "still very prevalent." The day before the social worker's March 27 interview with Mother, Mother and Father were fighting; Father broke all of the windows in the home "in a fit of rage" and the windows had to be fixed before the interview. Mother had also called the police to the home twice in recent weeks due to Father's behavior.

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the petition. CFS agreed Mother could file additional information supporting her petition without filing a new petition.

CFS also reported the MGP's wanted to provide permanency for C.A., as they had for A. C.A. called the MGP's "mom and dad" and was "very bonded" to the MGP's and to A. In conclusion, CFS reported that even though Mother "appear[ed] to be sober and engaging in programs to better herself," she was still involved with Father "with unstable housing and ongoing domestic violence . . . ." Thus, CFS argued that granting Mother services or placing C.A. in her care would not serve C.A.'s best interests and could endanger him.

At the April 26 hearing to consider Mother's section 388 petition, the court noted it had read Mother's petition and CFS's response or review report, and the court's intent was to deny the petition based on the response. The court asked Mother's counsel whether Mother had any further information. Mother's counsel argued Mother had "completed enough" services to "at least warrant a hearing" on her petition. She asked "for an opportunity to at least present evidence that she has done enough to warrant receiving services. . . ."

Minor's counsel argued against granting Mother's petition, noting there had been "no mention" of anything Mother had done to address her domestic violence with Father and Mother had "not really progressed much" because she was still living in a home leased by Father. County counsel argued Mother had not made a prima facie showing that her circumstances had changed since the October 31, 2017, jurisdiction/disposition hearing, and for that reason no evidentiary hearing on her petition was warranted. Mother's counsel replied that C.A.'s dependency was based on Mother's alcohol

problem; Mother had completed a drug program and was still in counseling; and urged the court and CFS not to "minimize" the progress Mother had made.

The court commended Mother for the progress she had made, but agreed she had made no prima facie showing that granting her either services or custody of C.A. would serve C.A.'s best interests. The court observed that the parents' domestic violence posed a danger to C.A. even though "other things" had changed. Thus, the court denied Mother's petition solely on the ground that granting her services or custody of C.A. would not serve C.A.'s best interests.

III. DISCUSSION

A. *Mother's Section 388 Petition Was Properly Denied Without an Evidentiary Hearing*

Mother claims the court erroneously denied her section 388 petition without an evidentiary hearing. We conclude no evidentiary hearing was warranted. The juvenile court did not abuse its discretion in concluding that Mother's petition did not make the required prima facie showing that granting her services or returning C.A. to her care would serve C.A.'s best interests. Thus, Mother's petition was properly denied without an evidentiary hearing, and it is unnecessary to determine whether Mother's petition made a prima facie showing of changed circumstances.

1. Legal Standards Governing Section 388 Petitions

Section 388 provides, in relevant part: "(a)(1) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing

to change, modify, or set aside any order of court previously made . . . . [¶] . . . [¶] (d) If it appears that the best interests of the child . . . *may* be promoted by the proposed change of order . . . the court *shall order that a hearing be held* . . . ." (Italics added.)

A section 388 petition "need only allege a prima facie case in order to trigger the right to proceed by way of a full hearing." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 592.) That is, the petition must make a prima facie showing of facts sufficient to sustain a favorable decision on the petition if the facts are credited or assumed to be true. (*Id.* at p. 593; *In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) The petition must be liberally construed in favor of its sufficiency (*In re K.L.* (2016) 248 Cal.App.4th 52, 62; Cal. Rules of Court, rule 5.570(a)), which is to say it must be "liberally construed in favor of granting a hearing to consider the parent's request." (*In re Marilyn H.*, *supra*, at p. 309.)

"'There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing.' [Citation.] We review the juvenile court's summary denial of a section 388 petition for an abuse of discretion.' [Citation.]" (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079.)

2. Analysis

Mother claims the court erroneously denied her section 388 petition without a full evidentiary hearing—that is, without allowing Mother to testify in support of her requests for services and/or the return of C.A. to her care. She argues her petition made the requisite prima facie showings of changed circumstances *and* best interests.

The juvenile court denied Mother's petition on the ground the petition failed to make a prima showing on the best interests prong of section 388—that granting Mother's requests for services or returning C.A. to her care would serve C.A.'s best interests. This was not an abuse of the court's discretion. On its face, the petition did not show that granting Mother services or custody of C.A. would serve C.A.'s best interests.

To be sure, Mother's petition showed Mother had made substantial progress in addressing her alcohol and substance abuse problems—the problems which led to C.A.'s dependency and A.'s earlier dependency. By February 28, 2018, Mother had completed an outpatient program and a parenting class, had attended AA meetings, had participated in individual counseling, and was sober. But C.A. was still only two years old in February 2018 and needed a stable and permanent home. C.A. had a stable and permanent home with the MGP's, who were committed to providing him permanency, as they done had for C.A.'s older sister A. when they adopted her in 2012.

"'[U]p until the time the section 366.26 hearing is set, the parent's interest in reunification is given precedence over a child's need for stability and permanency.' (*In re Marilyn H., supra*, 5 Cal.4th at p. 310.) [But] '[o]nce reunification services are

ordered terminated [or bypassed], the focus shifts to the needs of the child for permanency and stability.' (*Id*. at p. 309.)" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447.) Once reunification services are terminated or bypassed, the child's interest in permanency and stability "takes priority." (See *In re Marilyn H.*, *supra*, at p. 309.) C.A.'s need for permanency and stability "took priority" over Mother's interests in reunification with C.A. at the disposition hearing on October 31, 2017, when the court bypassed Mother's services based on her terminated services in A.'s dependency and her loss of parental rights to A. (§ 361.5, subd. (b)(10), (11).)

Thus, even if Mother's petition made a prima facie showing that Mother's circumstances had changed since October 31, 2017—a question the juvenile court did not and this court need not determine—Mother's petition did not make a prima facie showing that granting her services or custody of C.A. would serve C.A.'s best interest. (See, e.g, *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223-224 [mother failed to show how granting her services or liberalized visitation would have served child's best interest, when child was bonded to his foster parents and granting the mother's requests would have delayed the child's permanency].) In addition to detailing the efforts Mother had made to attain and maintain her sobriety and improve her parenting skills, Mother's petition alleged that C.A. missed Mother, had a strong bond with Mother, and "needs to be with his mother." But in view of Mother's very recently attained sobriety and her lengthy history of alcohol and substance abuse, these showings were not enough to satisfy the best interest prong of section 388.

In determining whether a section 388 petition makes its required prima facie showings, the court may consider the entire factual and procedural history of the case. (*In re K.L.*, *supra*, 248 Cal.App.4th at p. 62.) The court may also consider "(1) the seriousness of the problem that led to the dependency and the reason for any continuation of that problem; (2) the strength of the child's bond with his or her new caretakers compared with the strength of the child's bond with the parent; and (3) the degree to which the problem leading to the dependency may be easily removed or ameliorated, and the degree to which it actually has been. [Citation.]" (*In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 224.) None of these factors favored granting Mother's petition.

When a parent shows he or she is in the early stages of recovering from drug or alcohol addiction, as Mother's petition shows she was in February 2018, juvenile courts typically find this amounts to "changing" but not "changed circumstances." (See, e.g., *In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 223; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform."].) At the April 26, 2018, hearing to determine whether it should conduct a full evidentiary hearing on Mother's petition, the juvenile court appeared reluctant to find that Mother's petition showed only changing but not changed circumstances, after Mother's counsel urged the court not to dismiss the substantial progress Mother had made in attaining her sobriety.

Nonetheless, Mother's petition made no showing that C.A. had a stronger bond with Mother than he had with the MGP's and A. The entire record before the court on

April 26, 2018, showed that C.A. was in a loving, stable home with the MGP's and A., and the MGP's were committed to providing C.A. with permanency as they had for A. when they adopted A. in December 2012. In view of Mother's very recent and therefore fragile sobriety, and her failure to remain sober in prior years despite having had the benefit of reunification services, including substance abuse services, in A.'s dependency case, the court did not abuse its discretion in concluding that granting Mother services or returning C.A. to her care would not serve C.A.'s best interests.

Mother claims the court erred: (1) in not allowing Mother the opportunity to be heard on the points CFS made in its response to her petition; and (2) "[i]n failing to use the opportunity presented by the section 388 petition to order [CFS] to assist [Mother] in addressing the domestic violence concerns that [the response] raised . . . ." The court did not err in refusing to allow Mother to testify in opposition to CFS's responsive showings. On its face, Mother's petition made an insufficient prima facie showing on the best interest prong of section 388. Thus, the court was not obligated to allow Mother to testify either in support of her petition or in opposition to CFS's response, which alleged Mother had an ongoing relationship and domestic violence problem with Father, and unstable housing.

B. *There Was No Reversible ICWA Notice Error*

On October 26, 2017, CFS filed a declaration stating that, on October 16, 2017, CFS sent, by registered mail with return receipts requested, notices of the October 31, 2017, jurisdiction and disposition hearing to approximately 44 Indian tribes, the Bureau

of Indian Affairs (BIA), the Secretary of the Interior, and C.A.'s parents. (§ 224.2, subd. (a)(1), (d) ["No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the [BIA] . . . ."].) CFS's October 26 declaration indicated that as many as 25 of the noticed tribes had either not yet responded to the notices or CFS had not yet received the tribe's signed return receipt, acknowledging the tribe's receipt of the notice. At the October 31, 2017, jurisdiction and disposition hearing, the court found that "noticing" under the ICWA had been "initiated" and the ICWA "may apply."

On January 9, 2018, CFS filed a second declaration regarding its ICWA notices and the recipient tribes' responses. This declaration indicated that several of the noticed tribes signed return receipts indicating the tribe had received its notice of the October 31, 2017, hearing *fewer than 10 days* (eight days or less) before the October 31, 2017, hearing, and none of these tribes filed any "determinative response" to the notice within 60 days of its receipt of its notice. (§ 224.3, subd. (e)(3).) On January 10, 2018, the court found notices had been given as the ICWA required, and 65 days had passed since the notices were received, with no "affirmative response" of tribal membership having been received. (§ 224.3, subd. (e)(3) ["If proper and adequate notice has been provided pursuant to Section 224.2, and neither a tribe nor the [BIA] has provided a determinative response within 60 days after receiving that notice, the court may determine that the [ICWA] does not apply to the proceedings . . . ."].) Thus, on January 10, 2018, the court found the ICWA did not apply and no further ICWA notices were required to be given.

Mother claims the court's January 10, 2018, finding that the ICWA does not apply is erroneous because the record shows CFS did not give the required 10 days' notice of the October 31, 2017, hearing to several of the noticed tribes. (§ 224.2, subd. (d.) Mother also points out that these tribes did not file any responses to their notices. (§ 224.3, subd. (e)(3).) As a result, Mother claims "reversal and vacation of all findings and orders below is required . . . ." We disagree.

Violations of the notice requirements of ICWA and related California law are subject to a harmless error analysis: the appellant must show reasonable probability of a different result in the absence of the error. (*In re E.R.* (2016) 244 Cal.App.4th 866, 878.) Mother has failed to demonstrate a reasonable probability of a different result absent CFS's apparent error and delay in ensuring that several tribes received notice of the October 31, 2017, hearing at least 10 days before that hearing. At the very least, the record shows CFS substantially complied with the 10-day notice requirement of section 224.2, subdivision (d) by mailing notices of the October 31, 2017, hearing by certified mail, return receipts requested, to approximately 44 tribes, the BIA, and the Secretary of the Interior on October 16, 2017—*fifteen days* before the October 31 hearing.

And, to the extent CFS failed to mail the notices sufficiently in advance to ensure that each recipient *received* at least 10 days' notice of the October 31 hearing (§ 224.2 subd. (d)), Mother has not demonstrated a reasonable probability of a different result had each tribe *received* at least 10 days' notice of the hearing. Mother has not shown that any tribe which was entitled to notice of the October 31, 2017, hearing did not receive notice

of that hearing *before that hearing*. Nor has Mother shown that any of the given notices failed to advise the tribes of their right to request "up to an additional 20 days from the receipt of the notice" to prepare for the hearing and continue the hearing. (§ 224.2, subd. (a)(5)(G)(iii).) Even more importantly, Mother has not shown that CFS's delay, if any, in mailing any of the notices caused any tribe not to intervene in the proceedings.

IV. DISPOSITION

The April 26, 2018, order denying Mother's section 388 petition and the January 10, 2018, order finding the ICWA does not apply are affirmed. Mother's request that this court take judicial notice of the juvenile court's June 28, 2018, order continuing the section 366.26 hearing for C.A. from June 28, 2018, to October 28, 2018, is denied on the ground the order is not relevant to the issues on appeal. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

MCKINSTER
P. J.

SLOUGH
J.